

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,907

186

F. S. BOWEN ELECTRIC CO., INC.,

Appellant,

v.

FIDELITY & DEPOSIT CO. OF MARYLAND

and

J. D. HEDIN CONSTRUCTION CO., INC.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 5 1962

Joseph W. Stewart

CLERK

MICHAEL A. SCHUCHAT

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the surety on a supersedeas bond is discharged, ipso facto, when the Court of Appeals upholds the lower court but remands the case "to re-assess the award of damages", and on the remand in accordance with the mandate damages in a higher amount are awarded.

2. Whether in the foregoing circumstances the surety must seek and obtain an order of court at the time of the remand in order to be discharged from the obligation on the undertaking.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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F. S. BOWEN ELECTRIC CO., INC.,

Appellant,

v.

FIDELITY & DEPOSIT CO. OF MARYLAND

and

J. D. HEDIN CONSTRUCTION CO., INC.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final decision of the United States District Court for the District of Columbia denying the motion of F. S. Bowen Electric Co., Inc., (hereinafter referred to as Bowen) for judgment against Fidelity & Deposit Co. of Maryland (hereinafter referred to as

Fidelity), surety on a supersedeas bond. The principal on the bond is J. D. Hedin Construction Co., Inc. (hereinafter referred to as Hedin). Jurisdiction of the District Court was based on 11 D.C. Code §305. Jurisdiction of this Court to hear and determine this appeal is invoked under 28 U.S.C. §1291.

STATEMENT OF THE CASE

On December 31, 1956, Bowen entered into a written contract with Hedin whereby Bowen was to do the electrical work necessary in the construction of North Hagerstown High School (J.A. 9). On or about February 5, 1957, while the foregoing contract was in full force and effect, Hedin engaged another firm to do the same work it had engaged Bowen to perform.

Being thus prevented from performing the work and, considering Hedin's action to be a breach of its contract, Bowen brought suit on March 22, 1957 for damages.

Trial was had before a District Judge sitting without a jury in November 1958 and on November 24, 1958, the court entered judgment for Bowen. The court found that the parties had entered into a firm, valid, unconditional, binding and subsisting agreement which Hedin breached without cause or justification and that said breach was never consented to, acquiesced in or ratified by Bowen (J.A. 9-12).

The court entered judgment for Bowen against Hedin for \$30,000.00 (J.A. 12).

On the same day, November 24, 1958, Hedin filed a Motion for Supersedeas, asking the court "to stay the enforcement of the judgment in this action, pending the disposition of defendant's contemplated appeal to the United States Court of Appeals for the District of Columbia Circuit" (J.A. 13). The motion was granted and the court:

"Ordered That execution of and any proceedings to enforce the judgment entered herein this day be stayed, pending the determination of defendant's appeal from such judgment, provided that defendant file and have approved by this Court on or before 30 days from date of this Order a bond in the sum of \$30,000.00, conditioned in accordance with Rule 73(d) of the Federal Rules of Civil Procedure." (J.A. 13)

The bond was timely filed and appellee Fidelity & Deposit Co. of Maryland was the surety on said bond. The bond, in statutory form, was:

"conditioned for the satisfaction of the judgment in full with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award."

The appeal to this Court (No. 14,971) was argued before Judge W. K. Miller, Judge Washington and Judge Bastian. The opinion (106 U.S. App. D.C. 386, 273 F.2d 511) was per Judge Washington who rejected Hedin's chief argument that no enforceable contract ever came into effect and held that Hedin was liable. The opinion said: "Hedin is bound." However, this Court remanded the case because of an error in the computation of damages.

The judgment of this Court, entered January 18, 1960, was:

"that the judgment of the District Court appealed from in this cause be, and it is hereby, set aside, and this cause be, and it is hereby, remanded to said District Court for further proceedings not inconsistent with the opinion of this Court, which may include the taking of additional testimony, to reassess the award of damages."

On remand, the sole remaining issue was the "reassessment" of the award of damages in accordance with this Court's opinion.

On June 13, 1960, the District Court "referred the cause to Francis W. Hill, as Special Master to take evidence and to report the same, together with his findings of fact, and conclusions of law, all in accordance with the opinion herein of the United States Court of Appeals for the

District of Columbia Circuit." (J.A. 22) The Special Master heard testimony, filed a Report and Findings of Fact and Conclusions of Law. He concluded that there was due to Bowen \$34,151.85 with interest at 6% from November 24, 1958, the date of the judgment.

After receiving briefs and hearing argument, the District Court agreed. It sustained the Special Master's findings and conclusions and on October 24, 1961, entered judgment for Bowen against Hedin for \$34,151.85 with interest at 6% from November 24, 1958.

Immediately thereafter Bowen made demand against Hedin and against Fidelity on the supersedeas bond. Payment was refused.

On November 3, 1961, Bowen moved for judgment against the surety on the supersedeas undertaking (J.A. 24). Before this motion came on to be heard, Hedin filed an appeal on November 22, 1961. The motion came before Judge Holtzoff, who indicated that the pendency of the appeal made Bowen's motion premature since the supersedeas was still in effect. He therefore denied the motion without prejudice on December 11, 1961. (J.A. 26)

On January 4, 1962, Hedin withdrew its appeal. The following day Bowen renewed its motion for judgment against the surety. (J.A. 26)

On January 23, 1962, the motion was denied by Judge Curran without opinion (J.A. 27). The instant appeal is from this denial of Bowen's motion for judgment against the surety.

STATUTES, TREATIES, REGULATIONS, OR RULES INVOLVED

Federal Rules of Civil Procedure, Rule 73, Appeal to a Court of Appeals:

"(d) SUPERSEDEAS BOND. Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond

shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshal or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay."

"(f) JUDGMENT AGAINST SURETY. By entering into an appeal or supersedeas bond given pursuant to subdivisions (c) and (d) of this rule, the surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if his address is known."

STATEMENT OF POINTS

1. The District Court erred in denying appellant's motion for judgment against the surety on the supersedeas bond.
2. The District Court should have entered judgment in favor of appellant against the surety for the maximum amount of the bond with interest from the date of demand.

SUMMARY OF ARGUMENT

Elementary logic and justice require that a surety on a supersedeas bond be held liable whenever the final result of the litigation is that the principal is liable. The principal having had the benefit of an appeal, and the appellee having been stayed by the supersedeas bond from execution of the judgment, it is only fair that the surety be responsible for payment of the amount for which its principal is held responsible.

Questions of surety liability arise in cases such as this one, where the appeal does not terminate the action, e.g., where the Court of Appeals remands the case for further proceedings.

On appeal in this case, this Court affirmed appellant's liability and remanded solely to have the District Court "re-assess" the award of damages. The remand was not to determine if the plaintiff was to have a judgment, but how much the judgment should be. The reassessment resulted in a larger judgment. In this situation, the Fifth Circuit has held the surety is liable. Franklinville Realty Co. v. Arnold Construction Co., 132 F.2d 828 (5 Cir. 1943).

The Franklinville case is cited approvingly by this Court in Rector v. Massachusetts Bonding & Ins. Co., 89 U.S. App. D.C. 83, 191 F.2d 329, and the court below erred in not following it here.

The Rector opinion, which contains an extensive review of the authorities, holds the surety liable in cases such as this one. This Court said the question is one of substance, not one of labels or technical designation. When a judgment is "affirmed", the surety of course is liable. Notwithstanding the terms of the order, a judgment is "affirmed" unless there is a complete reversal, or at least substantial reversal, in fact.

In the case at bar, there was no reversal in fact. Liability was upheld on the appeal and the reassessment of damages resulted in a larger judgment. Under any criteria the appeal failed and the surety remains liable to the extent of its bond.

The surety on the supersedeas bond should not be released retroactively and discharged by implication. Unless it seeks and obtains an order releasing it from its undertaking at the time of its claimed discharge, it should remain liable thereon. The salutary effect of such principle is exemplified by the case at bar whereby this appellant is demonstrably prejudiced were this Court to consider today that there was an implied discharge of the surety by reason of this Court's opinion in October, 1959.

ARGUMENT

I.

PURPOSE OF SUPERSEDEAS BOND IS TO INSURE AN APPELLEE THAT HE WILL NOT SUFFER BY REASON OF A STAY OF EXECUTION PENDING APPEAL.

At the conclusion of a lawsuit, when a court decides the controversy and enters judgment, the winning party is entitled to execution of that judgment, i.e., to obtain that to which the court has decided he is entitled. The losing party has a right of appeal but this right, even when exercised, does not deprive the successful party from execution of the judgment ten days after the judgment is entered. And enforcement of the judgment does not deprive the losing party of his right to appeal (Koster & Wythe v. Massey, 262 F.2d (9th Cir.) 1958).

If, however, an appellant wishes to stay execution of the judgment against him, he must obtain a stay from the court and must file a supersedeas bond. Rule 73(d) of the Federal Rules of Civil Procedure sets forth the conditions of the bond:

"The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award."

This Court, in Rector v. Massachusetts Bonding & Ins. Co., 89 U.S. App. D.C. 83; 191 F.2d 329, quoting Crane v. Buckley, 203 U.S. 446-447 (1903), pointed out that the bond:

"was designed 'to indemnify the party prevailing in the original suit against loss in the respects stated in the bond, by reason of an ineffectual attempt to reverse the holding of the trial court. The successful party * * * could not have the decree executed * * * after the supersedeas bond was given, and the purpose of that instrument was to secure him from loss during the time and to the extent his hand was stayed from action'."

II.

EFFECTUATING THE PURPOSE OF A SUPERSEDEAS BOND, THE SURETY THEREON IS NOT DISCHARGED UNLESS THERE IS A COMPLETE REVERSAL OR AT LEAST SUBSTANTIAL REVERSAL.

Courts have generally carried out the purpose of the supersedeas bond by holding the surety thereon liable whenever the final result of the litigation is that the surety's principal is liable. When the appeal terminates the litigation, there is no problem. The question arises where, as in this case, the appeal does not end the litigation but results in further proceedings. When the final result of the further proceedings is that the appellant is determined to be liable, then the courts generally hold that the surety be liable.

This principle has extended even to the situation where there is a reversal for a complete new trial. The surety was held liable when the appeal resulted in a new trial in Lowry v. Tew, 25 Hun. (N.Y.) 257 (1881). The surety argued that reversal for a new trial terminated its obligation on the undertaking and that said obligation did not extend to a judgment recovered on the second trial. Not so, said the New York Supreme Court:

"That construction we think does not accord with the spirit or letter of the undertaking. The object of appellant in bringing the appeal was to obtain a new trial before the same justice. The granting of a new trial does not discharge

the surety, for until the new trial was had the result of the appeal was undetermined. The judgment recovered upon the new trial, and subsequently approved by the county court, was the judgment rendered on said appeal. In other words, the condition of the undertaking refers to the final determination of the appeal. (citing cases)"

The principle is expressed in an early North Carolina case which states that:

"the surety for an appeal * * * is surety to the action, and is bound to satisfy the judgment, which is finally rendered against the appellant." (Carroll v. McGee, 25 N.C. 13 (1842)) (Emphasis supplied.)

The law in this Circuit is that the surety on a supersedeas bond is not discharged from his liability unless the appellate court "wholly reverses" or at least "substantially reverses" the judgment below (Rector v. Mass. Bonding & Ins. Co., 191 F.2d 329, 89 U.S. App. D.C. 83). That was a suit brought by the holder of promissory notes secured by a deed of trust for the appointment of a trustee to foreclose on the security. Defendant counterclaimed for breach of covenant. The District Court granted plaintiff the relief sought and denied the counterclaim. The Court of Appeals held that the District Court erred in denying the counterclaim and it "affirmed in part; reversed in part, and remanded for action in accordance with this opinion."

On the remand, the District Court found that plaintiff was entitled to judgment. The security in the meantime was dissipated and the plaintiff moved to assess damages against the surety on the supersedeas bond. The District Court denied the motion. It held that the surety had been discharged by the decision of this Court affirming in part, reversing in part and remanding. On appeal this Court reversed unanimously and held that the surety remained liable.

The opinion of this Court contains an extensive review of the authorities and lays down the rule in this jurisdiction. This Court said that:

"the tendency has been to consider a judgment affirmed unless it is 'wholly reversed' or at least 'substantially reversed' by the appellate court."

In making this determination, this Court said that the technical designation of the court's remand or the wording of the opinion does not control. It is the substance that governs. This Court stated:

"Even a technical designation of reversal will not discharge liability on a bond conditioned on affirmance if the facts demonstrate a partial affirmance. 'The whole theory of the undertaking in such cases is that, so far as the judgment appealed from is finally declared to be right, the party in whose favor it is shall not suffer by the stay, and that so far as it is found to be right it will be complied with.'"

Inasmuch as this Court in the Rector case held that the technical designation does not control, we must look to the prior opinion of this Court in this case to determine what the result was. The order of this Court does not use the word "reversed"; it states the judgment below is "set aside" and the cause is "remanded." When the opinion is examined (106 U.S. App. D.C. 386, 273, 511), it is obvious that there was no reversal in substance.

Hedin's principal point on appeal was that no enforceable contract with Bowen ever came into effect because Bowen had never been approved by the Board of Education. The Court examined this contention and found that the contract did not require approval of Bowen, but merely gave the Board a right of rejection of Bowen, which right never had been exercised. This Court therefore concluded that on the principal point the appeal failed and that Hedin was liable to Bowen for breach of contract. Judge Washington stated this as clearly as possible. He said: "Hedin is bound."

The basis for remanding the case was the trial court's action in assessing damages. This Court was unable to say whether the trial court had followed the proper principles in assessing damages. Parenthetically, it should be noted that the Court's opinion does not indicate that the trial court's possible error in assessment of damages was necessarily one which aggrieved Hedin.

And, in fact, the final result of the litigation demonstrates that the error of assessing damages was an error in favor of Hedin rather than against him because the final amount of damages was in excess of the initial one. This demonstrates clearly that the appeal did not succeed. The trial court obviously was not wholly reversed. It was not even "substantially reversed" and under the principles of the Rector case, the surety therefore remained liable.

Aside from the principles enunciated, the Rector opinion also makes clear that the surety is not released in the circumstances of the case at bar by citing approvingly a case in which the surety was held liable which is almost identical with the case at bar - Franklinville Realty Co. v. Arnold Construction Co., 132 F.2d 828 (5 Cir. 1943). This Court said:

"In Franklinville Realty Co. v. Arnold Constr. Co., these general principles were applied to a fact situation similar in many ways to the case before us. The first appeal in Franklinville resulted in affirmance of the lower court to the extent that it had held Arnold was entitled to enforce a contractor's lien. There was also a partial reversal and a remand for the purpose of redetermining the amount of the lien in accordance with a different construction of a clause of the contract than that adopted by the trial court. The question on the second appeal was whether the District Court had erred in holding 'that the supersedeas bond on the first appeal was not released and discharged' by the partial reversal. The answer was that 'the judgment on the former appeal was not a judgment of reversal but one of affirmance with a reversal limited to taking evidence and obtaining findings not upon whether appellee should have a judgment but upon whether the judgment it had obtained should be for the same or a less sum. To abide this judgment as finally entered pursuant to the mandate, the surety remained bound.' " (191 F.2d at p. 323, 89 U.S. App. D.C., at p. 86)

In the first appeal in Franklinville (120 F.2d 144), as in the instant case, the chief argument was on the question of liability and in both cases the trial court's decision on liability was upheld. The remand in both cases was to reassess damages because of possible error in their

determination. In Franklinville the trial court had considered architect's certificates to be final and conclusive and the Court of Appeals held the certificates were only presumptive and could be rebutted. In the instant case, this Court remanded because it was unable to say whether the trial judge determined the damages based on the circumstances that existed at the time of the breach of contract, as required under proper principles of damages.

Both Franklinville and the instant case are identical in the present posture where the only issue is liability on the supersedeas bond. In both cases, the principal on the bond was finally held to be liable. The surety in Franklinville was held liable and appellee Fidelity, the surety herein, should similarly be held liable.

Thus, the principles enumerated in Rector and the example set forth therein - Franklinville - combine with the purpose of the supersedeas bond to require reversal in this case. All demonstrate that the Court below erred and that the surety was not discharged by this Court's prior opinion. Since the surety never sought nor received a specific order of discharge, it remains liable for the full amount of its undertaking.

III.

THE SURETY ON A SUPERSEDEAS BOND SHOULD NEVER
BE DISCHARGED FROM ITS LIABILITY WITHOUT SPECIFI-
CALLY SEEKING ITS DISCHARGE AND BEING SPECIFI-
CALLY RELEASED FROM LIABILITY.

Even though there was no implied discharge of the surety in the case at bar, the doctrine of retroactive implied discharge espoused by the surety herein is a most unfair and unjust principle which itself should be rejected by this Court.

It is highly unfair to the appellee for the surety on a supersedeas bond to enable its principal to litigate for several years until liability of the principal is finally fixed as to the amount and then at that time have the surety claim it was impliedly discharged by reason of an opinion of

this Court several years past. It is unjust because at the time of this Court's opinion, the surety did not seek to be discharged and no order of this Court or of the District Court released the surety from its liability. The least that can be asked of a surety claiming an implied discharge is that at the time it obtain an order of the court specifically releasing it. The appellee would have a right to be heard. Further, the order would be appealable at the time and in any event, if the surety were released, the appellee would have a chance to take other steps to protect its interests.

There is an element of estoppel inherent in the surety's course of conduct. It waited until the amount of liability was finally fixed. Its undertaking prevented execution of the judgment and enabled the appellee to prolong the litigation for several years at very substantial expense. Then, when the fight is lost and liability finally and unappealably attaches, the surety disclaims responsibility based on its unilateral interpretation of this Court's opinion two and a half years previous. Proper administration of justice would seem to require that the Court consider surety's plea as coming too late. It should be rejected on that ground alone.

CONCLUSION

In view of the foregoing the decision of the court below should be reversed and this Court should order judgment entered against appellee Fidelity & Deposit Co. of Maryland in the amount of \$30,000.00 with interest from November 3, 1961.

Respectfully submitted,

MICHAEL A. SCHUCHAT

231 Tower Building
Washington 5, D. C.

Attorney for Appellant



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JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

F. S. BOWEN ELECTRIC CO., INC.,)
Enterprise Road,)
Mitchellville, Maryland,)

Plaintiff,)

v.)

J. D. HEDIN CONSTRUCTION CO.,)
2900 Newton St., N. W.,)
Washington, D. C.,)

Defendant.)

Civil Action No. 717-'57

RELEVANT DOCKET ENTRIES

<u>Date</u>	<u>Proceedings</u>
<u>1959</u>	
Jan. 12	Consent order extending time for filing transcript of testimony for transmission to U.S. Court of Appeals to and including Jan 30, 1959 McLaughlin, J. (N)
Jan. 29	Consent order extending time for filing transcript of testimony to U.S.C.A. for D.C. Circuit to Feb. 16, 1959; extending time for filing record in U.S.C.A. for D.C. Circuit to Feb. 23, 1959. (N) McGuire, J.
Feb. 2	Pltff's exhibits Nos. 1-33 incl. filed
Feb. 24	Record on Appeal Delivered to USCA. Deposit \$1.10 by J. Roy Thompson, Jr.
Feb. 24	Receipt from USCA for original record. filed
Feb. 24	Transcript of Proceedings, Nov. 10, 13, 14, 18 and 19, 1958; Vol. I; pp. 1-56 & 57-165; 166-226; 227-364B; 365-466. (Rep. T. O'Neal and Harry Kaitz) filed
Feb. 24	Transcript of Proceedings, Nov. 10, 13, 14, 18 and 19, 1958; Vol I; pp. 1-56 & 57-165; 166-226; 227-364B; 365-466. (Rep. O'Neal & Kaitz) (Appellant's Copy) filed
Feb. 24	Deft's Exhibits Nos. 1-18 incl. filed
Mar. 10	Transcript of proceedings 11-24-58, pp. 467-475. (reported by Thomas O'Neal) filed

<u>Date</u>	<u>Proceedings</u>
<u>1959</u>	
Mar. 18	Supplemental Record on Appeal delivered to USCA. Deposit 50¢ by J. Roy Thompson, Atty.
Mar. 18	Receipt from USCA for Original Record. filed
Mar. 18	Stipulation re: supplemental record. filed
Mar. 18	Transcript of proceedings 11-24-58, pp. 467-475. (Rep. Thomas O'Neal) (Atty's Copy) filed
<u>1960</u>	
Jan. 18	Certified copy of judgment of USCA setting aside judgment of USDC & remanding for further proceedings; each party to bear own costs on appeal; copy of opinion attached. (N/AC) filed
Feb. 4	Certificate of Readiness (AC/N) filed
Feb. 17	Return of record to District Court files from Clerk USCA
Feb. 25	Pretrial statement of pltf filed
Feb. 25	Pretrial statement of deft filed
Feb. 25	Pretrial Proceedings (Asst Pretrial Examiner) (signed 2-23-60) and Order that record of prior trial be used by either party at trial; Matthews, J. (signed 2-24-60)
Jun. 8	Appearance of Daniel I. Sherry as associate counsel for pltf (AC/N) filed.
Jun. 13	Order referring cause to Francis W. Hill, Esq as Special Master, to take evidence and to report the same, together with his findings of fact and conclusions of law, in accordance with the opinion of the USCA for the D. C. Circuit. (N) Curran, J.
<u>1961</u>	
Feb. 16	Report of special master. filed.
Feb. 16	Findings of fact and conclusions of law of Special Master and Exhibits "A". filed
Feb. 16	Transcript of proceedings before Special Master 6-20-60; Vol. I (Rep. H. K. Klamans). filed.
Feb. 16	Transcript of proceedings before Special Master, 6-21-61; Vol. II. (Rep. H. K. Klamans). filed
Feb. 16	Transcript of proceedings before Special Master, 6-22-60; Vol. III. (Rep. H. K. Klamans.). filed

<u>Date</u>	<u>Proceedings</u>
<u>1961</u>	
Feb. 16	Transcript of proceedings, 6-23-60, Vol IV, before Special Master. (Rep. H. K. Klamans. filed
Feb. 16	Transcript of proceedings before Special Master, 6-24-60; Vol. V. (Rep. H. K. Klamans. filed.
Feb. 24	All counsel notified of the filing of Report of the Special Master on 2-16-61. filed.
Mar. 1	Certificate of special master as to payment of fee by plttf; c/m 3-1. filed.
Mar. 6	Motion of plttf. to modify masters findings and to confirm findings as modified; c/m 3-6-61; P & A; M.C. 3-6-61. filed.
Mar. 6	Objections of plttf. to Master's Report; c/m 3-6-61. filed.
Mar. 10	Motion of deft. for extension of time to file objections to masters' report; c/m 3-10; P & A; M. C. filed.
Mar. 13	Objections of deft. to Masters' Findings of Fact and Conclusions of Law; c/m 3-13-61. filed.
Mar. 16	Certificate as to payment of fee by deft.; c/m 3-14-61. filed.
June 30	Motion of deft. for oral argument on objections to Masters finding of fact & conclusions of law; c/m 6-30-61; P & A; M.C. filed.
Jul. 7	Answer of pltf to deft's motion for oral argument on objections to Master's finding of fact and conclusions of law; c/m 7/6/61 filed.
Oct. 24	Order sustaining findings of fact and conclusions of law of special master and granting judgment for pltf against deft for \$ 34,151.86 (thirty-four thousand one hundred and fifty-one dollars and eighty-six cents), together with 6% interest from Nov. 24, 1958 (N) Curran, J.
Nov. 3	Motion of pltf for judgment against surety on supersedeas undertaking c/s 11-2-61; ser. ack. by clerk, 11-2-61; P & A; M.C. 11-3-61 filed
Nov. 7	Appearances of Alexander M. Heron and Edgar T. Bellinger as attys for Fidelity and Deposit Co. of Maryland filed
Nov. 10	Notice by pltf to take deposition of deft; c/m 11-9-61. filed
Nov. 17	Points and authorities on behalf of Fidelity & Deposit Co., of Maryland; c/m 11-17-61 filed

<u>Date</u>		<u>Proceedings</u>
<u>1961</u>		
Nov.	22	Notice of Appeal by deft copy mailed to Geiger & Hamel; deposit by Thompson, \$5.00 filed
Nov.	24	Notice by pltf to take deposition of deft's Secretary; c/m 11-22-61 filed
Dec.	6	Attachment writs (2) interrogatories (2) issued; deposit by Schuchat, \$2.00; ser. 12-51-61 ser 12-6-61
Dec.	5	Attachment writs (3) interrogatories (3) issued; deposit by Schuchat, \$3.00
Dec.	7	Answer of Morris Abrams, garnishee, to interrogatories in attachment filed
Dec.	7	Answer of Rose Abrams, garnishee, to interrogatories in attachment filed
Dec.	11	Order denying without prejudice pltf's motion for judgment against surety. (N) Holtzoff, J.
Dec.	26	Motion of pltf to require deft to file additional supersedeas bond; c/m 12-22-61; P&A; M. C. 12-26-61 filed
Dec.	27	Deposition of Mrs. Margaret A. Hyde by pltf; exhibit A-1 filed
Dec.	29	P&A of Fidelity Deposit Co., of Md. in response to motion for additional bond; c/m 12-28-61 filed
<u>1962</u>		
Jan.	2	Appearance of Jackson and Gray as atty for deft J. D. Hedin Construction Co. filed
Jan.	2	Withdrawal of appearance by Bernard J. Gallagher and J. Roy Thompson as attys. for deft filed
* Jan.	5	Motion of pltf for judgment against surety on supersedeas undertaking; P&A; c/m 1- 4-62; M.C. 1-5-62 filed
* Jan.	4	Withdrawal and dismissal of appeal (Fiat) Sirica, J.
Jan.	9	Withdrawal of pltf's motion to require additional supersedeas bond per atty for pltf filed
Jan.	9	Motion of pltf for judgment of condemnation and for sale; c/m 1-8-62; exhibit; P&A; M. C. 1-9-62 filed
Jan.	11	Opposition of Fidelity and Deposit Company of Maryland to motion for judgment; c/m 1-10-62 filed

<u>Date</u>	<u>Proceedings</u>
<u>1962</u>	
Jan. 16	Transcript of proceedings of 12-4-61 at scheduled hearing in office of atty for pltf in re deposition of deft filed
Jan. 17	Opposition of deft to motion for judgment of condemnation and for sale of attached property; c/m 1-16-62 filed
Jan. 23	Order denying motion of pltf for judgment of condemnation and for sale of attached property (N) Curran, J.
Jan. 23	Order denying motion of pltf for judgment against surety on supersedeas undertaking (N) Curran, J.
Jan. 29	Notice of appeal of pltf; deposit by Schuchst, \$5.00 (copies mailed to Thomas Johnson & Alexander Heron filed
Mar. 5	Exhibits of plaintiff nos. 1 thru 8 filed
Mar. 5	Exhibits of defendant nos. 1 thru 7 & 9 thru 12 filed

[Filed Mar. 22, 1957]

**COMPLAINT FOR DAMAGES FOR BREACH
OF CONTRACT**

Comes now the plaintiff by its attorneys, Geiger and Harmel, and respectfully shows to the Court as follows:

1. Plaintiff corporation is an electrical contractor organized under the laws of the State of Maryland with its principal office in Mitchellville, Maryland. Defendant corporation is a general contractor organized under the laws of the State of Delaware and maintains its office in Washington, D. C.

2. The jurisdiction of this Court is invoked under Title 28, U.S.C.A., Sec. 1332, and all other applicable statutes and the common law. The amount in controversy, exclusive of interest and costs, exceeds \$3,000.00.

3. Prior to December 31, 1956, defendant had entered into a general contract with the appropriate authorities for the construction of the North Hagerstown High School at Hagerstown, Maryland. On December 31, 1956, plaintiff and defendant entered into a written contract wherein

plaintiff, for the consideration of \$310,000.00, was engaged by defendant to do all electrical work required under said general contract and is and has been at all times referred to herein ready, able and willing to perform said work as required by said contract.

4. Complaining of the defendant, plaintiff says that subsequent to the execution of said contract as aforesaid and without just cause or excuse, defendant breached its contract in that it advised plaintiff that it has entered into a contract with another electrical contractor to supercede plaintiff and to perform the identical electrical work for which it contracted with plaintiff.

5. By reason of defendant's breach of its contract as aforesaid, plaintiff has been damaged in the sum of \$65,000.00.

WHEREFORE, the premises considered, plaintiff prays for judgment against defendant in the sum of \$65,000.00, and for its costs herein.

GEIGER AND HARMEL

By: /s/ Irwin Geiger

[Filed April 11, 1957]

ANSWER TO THE COMPLAINT

First Defense

The Complaint fails to state a cause of action against the defendant.

Second Defense

1. Defendant admits the allegations of paragraph one in so far as they relate to the defendant Corporation, but requires proof of the remaining allegations.

2. The allegations of paragraph two are jurisdictional and require no answer.

3. For answer to paragraph three of the Complaint defendant admits that it has a contract for the construction of the North Hagerstown High School and that it entered into a sub-contract with plaintiff for the electrical work, but for information on the undertakings and provisions thereof the

Court will be shown the sub-contract and the documents referred to therein.

4 and 5. The allegations of paragraphs four and five are denied.

Third Defense

6. For further answer to the Complaint the defendant alleges that in paragraph 7 of its aforesaid sub-contract with defendant the plaintiff agreed as follows:

7. The sub-contractor further agrees to be bound to the contractor by the terms of the Agreement, General Conditions, Drawings and Specifications, Addenda and Alternates and to assume toward him all the obligations and responsibilities that he by those documents assumes toward the Owner and/or the Architect.

7. The Agreement with the Owner contained Special Condition, Article 70, Sub-Contractors, as follows:

"Article 36, 'Sub-Contracts' of the 'General Conditions' is hereby amended and supplemented as follows:

"1. Simultaneously with the award of contract the successful contractor shall submit to the Owner the names of sub-contractors he proposes to use on the construction of the building and the Owner reserves the right to accept or reject the use of any sub-contractor on the construction of the building."

8. The defendant duly submitted for approval a list of potential sub-contractors, including the name of plaintiff, and was given tentative approval thereof by the Architect as agent of the Owner. Pursuant to this tentative approval defendant awarded a sub-contract to plaintiff for the electrical work upon the North Hagerstown High School, for the consideration of Three Hundred Ten Thousand Dollars (\$310,000.00).

9. Subsequent to the award of the sub-contract just mentioned, defendant was informed by the School Board and the Architect that the plaintiff was unacceptable to them as sub-contractor because the School Board demanded, on the basis of community good will, that the work go to a local sub-contractor and because in case of mechanical or electrical

breakdown a local sub-contractor could render better and quicker repair service than an out-of-town sub-contractor, and thus avoid possible closing of the school for repairs.

10. The position of the School Board was fully explained to plaintiff by the defendant as well as by the Architect. Thereupon, in conference with defendant the plaintiff agreed that it would be inadvisable, as well as unprofitable, for him to insist upon performing the sub-contract under the circumstances existing; and he then agreed to the rescission of his sub-contract without cost to the defendant; and agreed that defendant could then award the sub-contract work to a local sub-contractor approved by the School Board and the Architect. Pursuant to this agreement by plaintiff, and without any protest on plaintiff's part, and in reliance upon the plaintiff's agreement to rescind the sub-contract without cost to defendant, the defendant awarded the same sub-contract work to A. G. Crunkleton Electric Company of Hagerstown, Maryland, at the same price as was stated in plaintiff's sub-contract.

3 11. At the time of plaintiff's agreement to consider the sub-contract rescinded plaintiff had not entered upon the performance of the work and had, therefore, performed no services and furnished no labor or material thereunder.

Fourth Defense

For reasons set out in the Third Defense, plaintiff is estopped to complain of defendant's actions.

WHEREFORE, the premises considered, defendant prays that the Complaint be dismissed with costs against the plaintiff.

/s/ Bernard J. Gallagher

/s/ J. Roy Thompson, Jr.
505 Union Trust Building,
740 Fifteenth Street, Northwest,
Washington 5, D. C.

MEtropolitan 8-4367

Attorneys for Defendant

[Certificate of Service]

[Filed Nov. 24, 1958]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial and the Court having duly considered the evidence and being fully advised in the premises now finds the following:

FINDINGS OF FACT

1. Plaintiff corporation is an electrical contractor organized under the laws of the District of Columbia with its principal office in Mitchellville, Maryland. Defendant corporation is a general contractor organized under the laws of the State of Delaware and doing business in the District of Columbia.

2. On or about December 11, 1956, defendant entered into a general contract with the Washington County Board of Education for the construction of the North Hagerstown High School. A copy of said contract is hereby incorporated by reference.

3. On December 31, 1956, plaintiff and defendant entered into a written contract whereby plaintiff, for the consideration of \$310,000.00, agreed to do all the electrical work required for the construction of the aforesaid high school. The terms of said contract are incorporated herein by reference.

4. At all times pertinent hereto, plaintiff was ready, willing and able to perform its contract with defendant. Plaintiff was fully qualified as to financial standing, competency and otherwise to perform its contract with defendant.

5. On or about February 5, 1957, while its contract with plaintiff was in full force and effect, defendant engaged A. G. Crunkleton Electric Co., Inc., of Greencastle, Pennsylvania, another electrical contractor, to perform the same work it had engaged plaintiff to perform. On February 7, 1957, said engagement was confirmed by letter from A. G. Crunkleton Electric Co., Inc. and on February 19, 1957, defendant and A. G. Crunkleton Electric Co., Inc. executed a formal contract, a copy of which contract is incorporated herein by reference. Defendant's acts

as aforesaid prevented plaintiff from further performing its electrical subcontract with defendant dated December 31, 1956.

6. The Instructions to Bidders for the general contract included the following:

"13. Contractor's Qualification Questionnaire

Before approval and signing of contract both the General Contractor and all sub-contractors must submit the Contractor's Qualification Questionnaire of the Washington County Board of Education."

The contract between defendant and the Washington County Board of Education contained the following provisions:

"Article 70. Article 36 (of the General Conditions) is amended and supplemented as follows:

1. Simultaneously with the award of the contract, the successful contractor shall submit to the Owner the names of sub-contractors he proposes to use on the construction of the building and the owner reserves the right to accept or reject the use of any subcontractor on the construction of the building."

The questionnaires referred to in Article 13 of Instructions to Bidders were not submitted to the Board of Education by defendant either prior to or at the time of the execution of the contract on December 11, 1956. On November 26, 1956, December 7, 1956 and January 10, 1957, defendant successively submitted three separate lists of subcontractors which it proposed to employ, each of which included the name of plaintiff. *the latter, however, indicating that*
The Board of Education at no time rejected plaintiff but on the contrary *defendant had awarded the*
expressed itself as fully satisfied with respect to plaintiff's ability to *Electrical*
perform the contract and its financial responsibility. *Sub contract to Plaintiff*

7. On February 5, 1957, defendant's president attended an informal meeting with the Board of Education at Hagerstown, Md. Plaintiff had no knowledge of this meeting. At that meeting, the preference of the Washington County Board of County Commissioners that the A. G. Crunkleton Electric Co., Inc. be employed as defendant's subcontractor was transmitted to

defendant with the request that it give preference to A. G. Crunkleton Electric Co., Inc. as its electrical subcontractor. Defendant did not disclose that it had entered into a formal and unconditional written contract with plaintiff on December 31, 1956, which was a binding obligation on both plaintiff and defendant.

8. Defendant notified plaintiff on February 11, 1957 of said meeting at Hagerstown but did not disclose that it had engaged A. G. Crunkleton Electric Co., Inc. to supersede plaintiff as its electrical contractor. Plaintiff first learned on or about March 20, 1957 that defendant had entered into a subcontract with A. G. Crunkleton Electric Co., Inc. to perform the identical work included in its contract of December 31, 1956 with defendant.

9. At no time did plaintiff relinquish its rights under the contract of December 31, 1956, either by rescission, acquiescence, ^{abandonment} consent, ^{or} otherwise.

10. In contracting with another electrical contractor to perform the electrical work, as aforesaid, defendant did not rely upon any statements, acts or omissions of plaintiff or anything done or not done by plaintiff.

11. Defendant at no time subsequent to December 31, 1956, the date of execution of its contract with plaintiff, changed its position because of anything said or done, nor not said or not done, by plaintiff.

12. * * * *

13. The damages hereinafter found to be suffered by plaintiff do not include any amount for the work plaintiff performed in preparing its bid to defendant of November 13, 1956 or any other work prior to ^{after} December 31, 1956.

14. On the basis of all the testimony and exhibits herein, the profits plaintiff could have fairly and reasonable anticipated had defendant permitted it to continue to perform under the aforesaid contract are at least Thirty Thousand Dollars (\$30,000.00).

CONCLUSIONS OF LAW

1. This Court has jurisdiction in this cause by virtue of 11 D.C. Code 306.
2. The written contract executed by the parties on December 31, 1956, was a firm, valid, unconditional, binding and subsisting agreement.
3. The action of defendant in engaging another to perform the work plaintiff had contracted to perform was a breach of the contract of December 31, 1956. Said action was without cause or justification and said action was never consented to, acquiesced in or ratified by plaintiff.
4. Plaintiff has been damaged by defendant in the sum of Thirty Thousand Dollars (\$30,000.00) and is entitled to judgment against defendant in that amount.

Let judgment be entered accordingly.

Dated this 24 day of November, 1958.

/s/ Edward P. Murphy
United States District Judge.

[These findings are entered over the general objections of the Defendant.
EPM USDJ (Signed)]

[Filed Nov. 24, 1958]

JUDGMENT

The above entitled action came on for trial before the Court without a jury on the 10th, 13th, 14th, 18th and 19th of November 1958, and evidence of both parties having been received and the cause having been argued by Counsel for both parties, and the Court having filed its findings of fact, conclusions of law and order for judgment herein, now, pursuant thereto, it is hereby this 24th day of November, 1958,

ORDERED AND ADJUDGED, that the plaintiff, F. S. Bowen Electric Co., Inc. have judgment against the defendant in the sum of Thirty Thousand Dollars (\$30,000.00), and its costs ~~and disbursements~~ in this action, with interest thereon from the date hereof.

* * *

/s/ Edward P. Murphy
United States District Judge

[Filed Nov. 24, 1958]

MOTION FOR SUPERSEDEAS

Defendant moves the Court to stay the enforcement of the judgment in this action, pending the disposition of defendant's contemplated appeal to the United States Court of Appeals for the District of Columbia Circuit; and, considering the circumstances of this case, to fix the amount of the bond required to be filed by defendant, at a nominal amount.

/s/ Bernard J. Gallagher

/s/ J. Roy Thompson, Jr.,
505 Union Trust Building,
740 Fifteenth Street, Northwest,
Washington 5, D. C.

Attorneys for Defendant.

[Filed Nov. 24, 1958]

ORDER GRANTING SUPERSEDEAS

This cause came on to be heard on Motion of defendant for a stay pending defendant's appeal to the United States Court of Appeals for the District of Columbia Circuit; and it appearing to the Court that defendant is entitled to such a stay, and considering the nature of the cause, it is by the Court this 24th day of November, 1958,

ORDERED That execution of and any proceedings to enforce the judgment entered herein this day be stayed, pending the determination of defendant's appeal from such judgment, provided that defendant file and have approved by this Court on or before 30 days from date of this Order a bond in the sum of \$30,000.00, conditioned in accordance with Rule 73 (d) of the Federal Rules of Civil Procedure.

/s/ Edward P. Murphy
Judge

[Filed Dec. 24, 1958]

SUPERSEDEAS UNDERTAKING ON APPEAL

The undersigned as principal has filed notice of appeal to the United States Court of Appeals for the District of Columbia to reverse or modify the judgment rendered by the United States District Court for the District of Columbia in the above-entitled cause on November 24, 1958, and to supersede said judgment is required to give an undertaking, under seal, in the sum of Thirty Thousand Dollars (\$30,000.00) dollars, conditioned for the satisfaction of the judgment in full with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award.

WHEREFORE, the undersigned J. D. Hedin Construction Co., Inc. as principal, and Fidelity and Deposit Company of Maryland, as surety, appearing and submitting to the jurisdiction of the court, hereby undertake for themselves and each of them, their and each of their heirs, executors, administrators, successors, and assigns to comply with the conditions as above set forth, and do further agree that, upon default by the said principal in any of the conditions hereof, the damages and costs, not exceeding the sum aforesaid, may be ascertained in such manner as this Court shall direct; that this Court may give judgment hereon in favor of any person thereby aggrieved against them for the damages and costs suffered or sustained by such aggrieved party, and that said judgment may be rendered in the above-entitled cause or proceeding against all or any of them whose names are hereto signed.

The said surety hereon hereby irrevocably appoints the clerk of this Court as its agent upon whom any papers affecting its liability on this undertaking may be served.

Signed, sealed, and delivered this
24th day of December, 1958,

in the presence of:

Harriet R. Snyder
Secretary

J. D. HEDIN CONSTRUCTION CO., INC.

by /s/ J. D. Hedin [SEAL]

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND

By /s/ Carlton D. Roz [SEAL]
Attorney-in-Fact

[SEAL]

Surety and amount approved this 24th day of Dec., 1958

Justice

HARRY N. HULL, Clerk

By Robert E. Huey
Deputy Clerk

[Filed Jan. 18, 1960]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,971

September Term, 1959.

APPEAL FROM the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Washington and Bastian, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment ----- of the District Court appealed from in this

cause be, and it is hereby, set aside, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court, which may include the taking of additional testimony, to re-assess the award of damages.

It is further ORDERED by the Court that each party bear its own costs on this appeal.

Per Circuit Judge Washington.

Dated: October 8, 1959

A true Copy,

Test: /s/ Joseph W. Stewart

Clerk of the United States Court of Appeals
for the District of Columbia Circuit

[Filed Jan. 18, 1960]

Appeal from the United States District Court
for the District of Columbia

Decided October 8, 1959

Mr. J. Roy Thompson, Jr., with whom Mr. Bernard J. Gallagher was on the brief, for appellant.

Mr. Irwin Geiger, with whom Mr. Michael A. Schuchat was on the brief, for appellee.

Before WILBUR K. MILLER, WASHINGTON and BASTIAN,
Circuit Judges.

WASHINGTON, Circuit Judge: This is a suit for breach of contract. The Hedin Company was general contractor for the construction of a new school building in Maryland. Hedin executed a written agreement in standard form with the Bowen firm, whereby Bowen was named as electrical sub-contractor for the project and agreed to do stated work for the total sum of \$310,000. Some six weeks later, Hedin entered into an agreement for the same work with another firm (the A. G. Crunkleton Electric Co.), and notified Bowen that the contract had been "re-awarded." Bowen

brought suit for breach of contract. The District Court, sitting without a jury, found for Bowen, and awarded damages.

On appeal, defendant appellant Hedin urges chiefly that no enforceable contract with Bowen ever came into effect, saying that Bowen was never approved by the local Board of Education sponsoring the construction project, and that such approval was a prerequisite. The Bowen-Hedin contract does recognize that the Board -- which was not a party to it -- has "the right to accept or reject the use of any sub-contractor on the construction of the building." But the trial judge found as a fact, on the basis of fully adequate evidence, that the Board of Education "at no time rejected plaintiff but on the contrary expressed itself as fully satisfied with respect to plaintiff's ability to perform the contract and its financial responsibility." True, the record shows that the Board wanted the electrical work to go to Crunkleton, and that Hedin acted as it did in an effort to be obliging. Also, the Board later formally accepted Crunkleton at Hedin's request. But there is no showing that the Board then knew that Hedin had previously entered into a signed contract with Bowen, and we do not think the Board's action amounted to a rejection of Bowen in the contractual sense. Clearly Hedin cannot argue that the Board's unexercised right of rejection relieves Hedin from liability on the contract which it had theretofore executed with Bowen.^{1/} Hedin is bound.

3 We are constrained, however, to reverse the judgment, by reason of error in the computation of damages by the District Court. The court made an award in the following terms in its findings of fact:

"13. On the basis of all the testimony and exhibits herein, the profits plaintiff could have fairly and reasonably anticipated had defendant permitted it to continue to perform under the aforesaid contract are at least Thirty Thousand Dollars (\$30,000.00)."

^{1/} Whether the Board's "right" of rejection was absolute and unqualified we need not now decide. Under the contract it might perhaps have required Bowen to file a financial statement ("questionnaire"), but it did not insist on this. As the trial judge found, it was satisfied with respect to Bowen's financial responsibility. Under the circumstances, Bowen's failure to file such a questionnaire did not operate to relieve Hedin from liability.

In its conclusions of law the court said:

"4. Plaintiff has been damaged by defendant in the sum of Thirty Thousand Dollars (\$30,000.00) and is entitled to judgment against defendant in that amount.

"Let judgment be entered accordingly."

At an earlier stage, the judge had reviewed with counsel for both parties the form and content of the draft findings and conclusions proposed by the plaintiff. When asked by defense counsel for an explanation of the amount awarded, the judge replied:

"The \$30,000 was arrived at after a complete and thorough analysis of the testimony of the witness Phelps, in which I cut down his approximations. I did not believe that they were warranted. I think we arrived at \$27,000, wasn't it, and then I merely added the \$3,000 to make it an even number."

The action of the judge in adding \$3,000 to the award "to make it an even number" was clearly improper. Litigants' funds are not to be dealt with so lightly. Further, the \$27,000 figure does not appear to have any sound legal or evidentiary basis. The "witness Phelps," referred to by the judge, was an electrical contractor, offered as an expert by the defendant Hedin. Phelps testified that in his opinion the work would have cost \$330,518, as against the contract price of \$310,000, resulting in a loss of \$20,518. How the court converted this into a profit of \$27,000 is not clear. (Plaintiff claimed it would have made profits totaling \$53,713 -- almost exactly twice the figure of \$27,000 arrived at by the court.)

4 The "approximations" to which Phelps testified were his estimates of the probable cost of necessary labor and materials, viewed as of the date of the contract. Whether or not these "approximations" were accurate is not, of course, our task to say. But it does not appear that the trial judge acted on the basis of the evidence offered by either party, or the governing principles of law, in cutting them down. Plaintiff's computation of \$53,713 in lost profits was arrived at in the following manner: At the time of the bid, plaintiff estimated the probable profits which it would make at \$19,537. At the trial, plaintiff added to this figure certain

so-called "savings" of \$38,776. These "savings" were largely, if not entirely, based on the fact that certain materials turned out to be obtainable on the market at lower prices during the year following the contract. From the total figure of \$58,313 thus reached plaintiff deducted items totaling \$4,600, covering mathematical errors and a subsequent wage rate increase. The net figure of \$53,713 thus to a substantial degree reflected events which occurred after the contract was executed, and after its breach.

In situations like the present, the innocent party is entitled to recover the loss of profit resulting from the breach of contract. The measure of the loss is the contract price less the costs which plaintiff would have incurred in completing his contract obligation. See, generally, M & R Contractors & Builders, Inc. v. Michael, 215 Md. 340, 138 A.2d 350 (1958). Such costs are to be estimated as nearly as may be according to "the circumstances that existed at the time of breach." See 5 CORBIN, CONTRACTS § 1094, at 426 (1951); Carras v. Birge, 211 S.W.2d 998 (Tex.Civ.App. 1948). Cf. Sternberg Dredging Co. v. Dawson, 171 Ark. 604, 285 S.W. 32 (1926). We are unable to say that the trial judge followed this principle in awarding damages to the plaintiff; in fact, the indications are that he did not.

- 5 Plaintiff-appellee urges that the judgment be sustained, arguing that a general verdict by a jury or by a judge sitting alone, awarding \$30,000 to this plaintiff for the loss of a valuable contract, would have been within the bounds of reasonableness, and within the trier's prerogative of picking and choosing between bits of conflicting testimony. Be that as it may, it is not a sufficient answer. The jury must, after all, act only on proper instructions. The judge sitting as trier of the facts must act on a sound legal and evidentiary basis; if his statements and actions

indicate that he did not do so, to the serious prejudice of an appellant, correction must follow. ^{2/}

For these reasons, the judgment will be set aside and the case remanded for further proceedings not inconsistent with this opinion, which may include the taking of additional testimony, to re-assess the award of damages. We intimate no view on the remaining contentions of the parties.

So ordered.

[Filed Feb. 25, 1960]

PRE-TRIAL STATEMENT OF PLAINTIFF

This case comes before the Court on remand from the United States Court of Appeals for the District of Columbia Circuit to reassess the award of damages. The sole issue to be determined is the damages to be assessed against defendant for the profits which plaintiff lost as a result of defendant's breach of contract. Since the contract price was fixed, the issue is simply the costs of performing the contract as estimated prior to the time of the breach. Plaintiff computes its damages as follows:

* * * * *

/s/ Irwin Geiger

/s/ Michael A. Schuchat

Attorneys for Plaintiff.

^{2/} We recognize that ordinarily the court's formal findings are controlling. See *Stone v. United States*, 164 U.S. 380 (1896); cf. *Federal Trade Commission v. B. F. Goodrich Co.*, 100 U.S. App. D.C. 58, 63, 242 F.2d 31, 36 (1957). But where the record shows a prejudicial error of law by the court in reaching the finding, it may be set aside. See *United States v. U. S. Gypsum Co.*, 333 U.S. 364, 394-95 (1958); *In re Knetzer*, 229 F.2d 232, 237 (7th Cir.), reversed on other grounds sub nom. Jaffke v. Dunham, 352 U.S. 280 (1957). And compare *Hatahley v. United States*, 351 U.S. 173, 182 (1956).

[Filed Feb. 25, 1960]

**DEFENDANT'S PRETRIAL
STATEMENT ON REMAND**

The defendant asserts that the only question presently involved in this litigation is the amount of damages, if any, sustained by the plaintiff as a result of what has been finally held by the United States Court of Appeals of the District of Columbia to be a breach of a construction contract between plaintiff and defendant.

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/s/ Bernard J. Gallagher

/s/ J. Roy Thompson, Jr.

505 Union Trust Building
Washington 5, D. C.

Attorneys for defendant

[Filed Feb. 25, 1960]

PRETRIAL PROCEEDINGS

Statement of Nature of Case:

Action for breach of contract by sub-contractor against prime contractor.

On December 31, 1956 P, S. Bowen Electric Co., Inc., entered into a written contract with D, J. D. Hedin Construction Co., Inc., whereby P was named as electrical sub-contractor for construction of a school building in Maryland for a total contract price of \$310,000. Later, Hedin entered into an agreement for the same work with another firm and notified Bowen that the contract had been "re-awarded." P brought action for damages for breach of contract, and the court found for P. Judgment for P was affirmed by the Court of Appeals Oct. 8, 1959, but the case was remanded to this court for reassessment of damages, the sole remaining issue in the case.

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3 D asserts that P's claim for damages is, under the opinion of the Court of Appeals, limited as follows:

Anticipated profit in P's bid		\$19,255
Less Errors P admits in preparation of its bid:		
Mistaken estimate	\$1,600	
Temporary service	1,000	
Wage rate increase	<u>2,000</u>	<u>\$ 4,600</u>
Maximum plaintiff's claim		\$14,655

Defendant asserts, however, that, while plaintiff's claim is limited to the sum of \$14,655, plaintiff made serious errors of commission and
 4 omission in the preparation of its bid which if such had not occurred, would have resulted in a loss to the plaintiff had it performed the contract, and consequently that plaintiff is not entitled to recover any damages. In addition, any loss of profit is so speculative in this case as to be an improper basis for any award of damages.

* * * * *

/s/ Elizabeth Buntin
 Asst. Pretrial Examiner

/s/ Michael A. Schuchat
 Attorney for Plaintiff

/s/ J. Roy Thompson, Jr.
 Attorney for Defendant

[Filed June 13, 1960]

ORDER

This cause having come on for trial on remand from the United States Court of Appeals for the District of Columbia Circuit, it is by the Court this 13 day of June, 1960,

ORDERED, that this cause be and the same is hereby referred to Francis W. Hill, Esq., as Special Master, to take evidence and to report the same, together with his findings of fact and conclusions of law, all

in accordance with the opinion herein of the United States Court of Appeals for the District of Columbia Circuit.

/s/ Edward M. Curran
JUDGE

[Filed Feb. 16, 1961]

REPORT OF SPECIAL MASTER

Posture of Case

This is a suit for breach of contract brought by Bowen Electric Co., Inc. (hereinafter referred to as Bowen), plaintiff, a subcontractor, against Hedin Construction Co. (hereinafter referred to as Hedin), defendant, the general contractor; the main contract was for the construction of the North Hagerstown High School, Hagerstown, Md.; the subcontract was for the installation of electrical equipment.

This case was tried and an appeal was taken to our Court of Appeals, 106 U.S. App. D.C. 386. The lower court found that there was a valid contract, that Hedin breached the contract and that Bowen was damaged in the sum of \$30,000.00. The Court of Appeals affirmed as to the validity of the contract and as to the breach, but remanded as to the damages, stating that the judge sitting as the trier of facts, did not act on a sound legal and evidentiary basis, and therefore, correction must follow. The case was remanded for further proceedings which may include the taking of additional testimony, to reassess the award of damages:

* * * * *

Facts in Dispute

The plaintiff claims damages in the sum of \$65,000.00; by the pre-trial statement Bowen sought to recover \$77,014.00. Hedin denies that it is indebted to Bowen and further contends that Bowen would have sustained a loss of about \$30,000.00, had it completed the contract.

* * * * *

February 16, 1961

/s/ Francis W. Hill, Special Master
Tower Bldg., Washington, D. C.

[Filed Feb. 16, 1961]

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

* * * * *

CONCLUSIONS OF LAW

The Special Master finds that there is due to the plaintiff by the defendant the sum of \$34,151.85, together with interest at six percent from November 24, 1958, the date of the judgment, and that judgment, in the opinion of the Special Master, should be entered accordingly.

February 16, 1961

/s/ Francis W. Hill, Special Master
Tower Building, Washington, D.C.

[Filed Oct. 24, 1961]

ORDER

The findings of fact of the Special Master and his conclusions of law are sustained. Under these there is due and owing to the plaintiff by the defendant the sum of \$34,151.86, together with interest at 6% from November 24, 1958, and judgment is hereby entered accordingly.

/s/ Edward M. Curran
Judge

[Filed Nov. 3, 1961]

**MOTION FOR JUDGMENT AGAINST SURETY
ON SUPERSEDEAS UNDERTAKING**

Plaintiff moves the Court to enter judgment in favor of plaintiff against The Fidelity & Deposit Co. of Maryland, and for execution thereon and for grounds of this motion states as follows:

1. On November 24, 1958, this Court entered judgment in favor of plaintiff against defendant in the amount of \$30,000.00 and costs.

2. On November 24, 1958, this Court granted defendant's motion for a stay of proceedings pending determination of defendant's appeal to the United States Court of Appeals for the District of Columbia Circuit, provided defendant file a bond in the sum of \$30,000.00 conditioned in accordance with Rule 73(d) of the Federal Rules of Civil Procedure.

3. On December 24, 1958, defendant filed in this Court a Superseas Undertaking in the amount of \$30,000.00 with surety thereon being The Fidelity & Deposit Co. of Maryland. Said undertaking was approved by the Court.

4. On October 8, 1959, the United States Court of Appeals for the District of Columbia Circuit ordered that "the judgment of the District Court appealed from in this cause be, and it is hereby, remanded to said District Court for further proceedings not inconsistent with the opinion of this Court, which may include the taking of additional testimony, to reassess the award of damages."

5. On June 13, 1960, this cause came on for trial on the remand and was referred to a "Special Master to take evidence and to report the same, together with his findings of fact and conclusions of law, all in accordance with the opinion herein of the United States Court of Appeals for the District of Columbia Circuit."

6. On February 16, 1961, the Special Master made his report and found "that there is due to the plaintiff by the defendant the sum of \$34,151.85, together with interest at six percent from November 24, 1958, the date of the judgment, and that judgment, in the opinion of the Special Master, should be entered accordingly."

7. On October 24, 1961, this Court entered judgment for plaintiff against defendant in the sum of \$34,151.85, together with interest at six percent (6%) from November 24, 1958.

8. Plaintiff made demand on defendant and surety and no payment has been made. Defendant and the surety are in default of the judgment in full, with interest.

Respectfully submitted,

/s/ Michael A. Schuchat
Attorney for Plaintiff.

[Filed Dec. 11, 1961]

O R D E R

This cause came on for hearing on plaintiff's motion for judgment against surety on supersedeas undertaking and after hearing argument, it is this 11 day of December, 1961,

ORDERED, that said motion be and the same is hereby denied without prejudice.

/s/ Alexander Holtzoff
United States District Judge

[Certificate of Service]

[Filed Jan. 5, 1962]

MOTION FOR JUDGMENT AGAINST SURETY
ON SUPERSEDEAS UNDERTAKING

Plaintiff moves the Court to enter judgment in favor of plaintiff against The Fidelity & Deposit Co. of Maryland, and for execution thereon. This motion was argued to Judge Holtzoff on December 1, 1961 who, after learning that a Notice of Appeal had been filed in the cause, denied the motion without prejudice (Order, December 11, 1961). The Notice of Appeal has been withdrawn and the appeal dismissed and plaintiff therefore renews its motion.

* * * * *

/s/ Michael A. Schuchat,
Attorney for Plaintiff,
231 Tower Bldg.,
Washington 5, D. C.

[Filed Jan. 23, 1962]

ORDER

Upon consideration of the motion of plaintiff for Judgement against surety on supersedeas undertaking filed herein January 5, 1962, it is this 23rd day of January, 1962,

ORDERED that the motion be, and the same hereby is, denied.

HARRY M. HULL, Clerk

By: /s/ Daniel J. Mencoboni
Deputy Clerk

By direction of

EDWARD M. CURRAN
Judge

[Filed Jan. 29, 1962]

NOTICE OF APPEAL

Notice is hereby given this 29th day of January, 1962, that F. S. BOWEN ELECTRIC CO., INC., Plaintiff, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 23rd day of January, 1962 denying plaintiff's motion for judgment against Fidelity and Deposit Company of Maryland, surety on supersedeas undertaking.

/s/ Michael A. Schuchat
Attorney for Plaintiff

Serve: Thomas Jackson, 1025 Conn. Ave., Atty for Def.
Alexander Heron, Munsey Bldg., Atty for F. & D.

BRIEF FOR APPELLEE, FIDELITY AND DEPOSIT
COMPANY OF MARYLAND

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,907

F. S. BOWEN ELECTRIC COMPANY, INC., *Appellant.*

V.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and
J. D. HEDIN CONSTRUCTION COMPANY, INC., *Appellees.*

Appeal From a Judgment of United States District Court
for the District of Columbia

ALEXANDER M. HERON
EDGAR T. BELLINGER
707 Munsey Building
Washington 4, D. C.
*Attorneys for Fidelity and
Deposit Company of Maryland*

STATEMENT OF QUESTION PRESENTED

In the opinion of this appellee, the question is:

Where a judgment entered on November 24, 1958 was set aside by this Court on appeal, is a supersedeas bond which was conditioned for the satisfaction of that judgment in full if the appeal be dismissed or if the judgment be affirmed and to satisfy such modification of the judgment as the Appellate Court might adjudge and award, liable for the amount of a new judgment entered after the conclusion of a second trial.

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* Cases or authorities chiefly relied upon are marked by asterisks.

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,907

F. S. BOWEN ELECTRIC COMPANY, INC., *Appellant*,

v.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and
J. D. HEDIN CONSTRUCTION COMPANY, INC., *Appellees*.

Appeal From a Judgment of United States District Court
for the District of Columbia

**BRIEF FOR APPELLEE, FIDELITY AND DEPOSIT
COMPANY OF MARYLAND**

COUNTERSTATEMENT OF THE CASE

This action was originally commenced by a complaint filed by F. S. Bowen Electric Company, Inc. on March 22, 1957 alleging breach of contract. (J.A. 5-6) The defendant J. D. Hedin Construction Co., Inc. denied that the contract was effective due to the failure of the School Board and Architect to approve the plaintiff as its subcontractor. The defendant also alleged that the plaintiff agreed to

consider the subcontract rescinded. There had been no performance by either party under the contract. (J.A. 6-11) Plaintiff's claim was for anticipated profits. After trial the court below found for the plaintiff and on November 24, 1958 awarded it a judgment of \$30,000. (J.A. 12) The defendant appealed, filing with the court below the supersedeas bond which is the subject of the present controversy. (J.A. 14-15)

The appeal was heard by this Court which was:

" * * * constrained, however, to reverse the judgment, by reason of error in a computation of damages by the District Court." (J. D. Hedin Construction Co. v. F. S. Bowen Electric Co., 106 U.S. App. D.C. 387, 273 F. 2d at 512)

This Court then reviewed the record in some detail with respect to the damages claimed, pointing out the errors which were involved in their computation. Outstanding among these was the inclusion of an item of \$3,000 to make an even number. It is obvious that this Court was not satisfied with the basis of judgment. It pointed to evidence before the trial court to the effect that the plaintiff would have made no profit in the performance of the work.

This Court then concluded:

"For these reasons, the judgment will be set aside and the case remanded for further proceedings not inconsistent with this opinion, which may include the taking of additional testimony, to re-assess the award of damages. We intimate no view on the remaining contentions of the parties.

"So ordered." (106 U.S. App. D.C. 388, 273 F. 2d 513)

Following the announcement of the Court's opinion on January 18, 1960, the judgment order of this Court was filed in the District Court. That order recited:

"On consideration whereof it is ordered and adjudged by this Court that the judgment of the District Court

appealed from in this cause be, and it is hereby, set aside, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court, which may include the taking of additional testimony, to re-assess the award of damages.

"It is further ORDERED by the Court that each party bear its own costs on this appeal." (J.A. 15-16)

The supersedeas bond, in conformity with Rule 73(d) of the Rules of Civil Procedure (Appellant's Brief, pp. 4-5) recited that the defendant, J. D. Hedin Construction Company, had filed notice of appeal to reverse or modify the judgment rendered by the District Court and to supersede the judgment was required to give an undertaking in the sum of \$30,000. The undertaking was:

" * * * conditioned for the satisfaction of the judgment in full with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award." (J.A. 14)

Following the decision of this Court reported in 106 U.S. App. D.C. 386, 273 F. 2d 511 there were further pretrial proceedings after which the court referred the cause to a Special Master. (J.A. 20-23) After the coming in of the Master's report and further proceedings thereon, the District Court on October 24, 1961 entered judgment against the defendant in favor of the plaintiff for \$34,151.86. (J.A. 23-24, 3) A subsequent motion by the plaintiff for judgment against this appellee as surety on the supersedeas bond was denied. (J.A. 24-26)

SUMMARY OF ARGUMENT

The liability of a surety on a supersedeas bond is contractual. The terms of the bond are specified by the Federal Rules of Civil Procedure. The bond is conditioned to protect the appellee should the appeal fail thus leaving him in possession of his judgment, either in whole or in part. Where the judgment is set aside, the condition of the bond is fulfilled and its obligation is ended.

Decided cases upon this subject have adhered to the contractual aspect of the bond's coverage. They have recognized liability where the original judgment was preserved in part. The bond is not liable for a second judgment rendered after the superseded judgment has been set aside.

ARGUMENT

The obligation which a surety voluntarily assumes at the request of the appealing party is contractual.¹ *Bankers Surety Co. v. Security Trust Co.*, 39 App. D.C. 354 (1912). Its terms are fixed by the Federal Rules of Civil Procedure. It conforms precisely to the language of Rule 73(d). That both the Rule and the undertaking are the product of careful study is demonstrated by the explicit provisions which they contain. A surety upon a supersedeas bond must answer for the full obligation of its contract, but it should not be required to answer beyond the fair meaning of the instrument. Under the terms of the undertaking there are three circumstances under which the supersedeas bond becomes answerable. They are:

1. If for any reason the appeal is dismissed,
2. If the judgment is affirmed, and
3. If the Appellate Court shall adjudge and award a modification of the judgment.

¹ Under practice here before the adoption of the Federal Rules the bond was conditioned that appellant "shall prosecute its appeal to effect, and answer all damages and costs, if it shall fail to make good its plea, * * *."

In this case this Court set aside the judgment and remanded the cause for further proceedings. (J.A. 15-16) That is the judgment on appeal. It effectively terminated and completely destroyed the judgment of the District Court. Nothing remained of the prior action of the District Court; it was set aside. There could have been no assurance following the setting aside of the District Court judgment that any award of damages would ever be entered against the defendant. Indeed this Court (on pages 387-8, 106 U.S. App. D.C., 513 of 273 F. 2d) reviewed the testimony of one witness which indicated that the appellant would have suffered a loss had it performed the subcontract.

Under Rule 73(d) of the Federal Rules of Civil Procedure an appellant may give his personal bond and deposit with the Clerk of the Court bearer obligations of the United States by court approval in lieu of surety. *Fakouri v. Cadais*, 147 F. 2d 667 (CA 5, 1945). There is no authority which would deny the successful appellant the right to the return of his security after the judgment appealed from had been set aside. The security is not deposited to answer for whatever the ultimate judgment may be. There is no difference in result where the bond has surety in lieu of the deposit of security.

Appellant cites two decisions of state courts to support its position that the bond is liable for the subsequent judgment. The first of these is *Carroll v. McGee*, 25 N.C. 13 (1842) in which an action, commenced before a Justice of the Peace, terminated favorably to the plaintiff. An appeal by the defendant to the County Court resulted in a non-suit being entered there. Plaintiff in turn appealed to the Superior Court which reversed the County Court. The bond which had been given by the defendant to secure the appeal was held answerable for the judgment. It will be at once observed that the judgment for which the bond was answerable was the original judgment for which it was given. It would be a surprising result if a successful plaintiff should lose the security of a supersedeas bond because

of a reversal by an intermediate appellate court where the judgment was ultimately affirmed by the highest court when the appeal was carried there. Obviously, this decision has no application to the case at bar.

The other case cited by appellant is *Lowry v. Tew*, 25 Hun 257, N.Y. (1881). That case arose under a bond given pursuant to a New York statute which made the bond answerable for any final judgment which might be rendered in the case. The decision of that case was analyzed in *Anderson v. Messenger*, 208 F. 75 (1913) where the court pointed out that the liability of the bond required under the New York law was quite different from the liability resulting from the application of then Section 1000 of United States Compiled Statutes governing supersedeas bonds in United States courts. It is not believed that the appellant here seriously contends that the liability of a supersedeas bond under the Federal Rules is to answer for whatever final judgment may be entered at the conclusion of the action, even though its brief contains sweeping statements to this effect.

Appellant places its reliance upon *Rector v. Massachusetts Bonding and Insurance Company*, 89 U.S. App. D.C. 83, 191 F. 2d 329 (1950). There plaintiff sought foreclosure of security and reformation of a deed of trust. The defendant answered and filed a counterclaim for breach of covenant. The plaintiff prevailed upon his primary claim and also succeeded in defeating the counterclaim. On appeal to this Court, *Thompson v. Rector*, 83 U.S. App. D.C. 371, 170 F. 2d 167 (1948), the defendant apparently abandoned his opposition to the plaintiff's primary claim but succeeded in obtaining a reversal of the judgment against him on the counterclaim. This Court affirmed that portion of the judgment which represented the plaintiff's original claim but reversed as to the counterclaim, saying:

"The case will be remanded for retrial of the single counterclaim of appellants for \$8000 for costs of repairs

and alterations required to put the premises in condition to obtain a license. In this particular the judgment is reversed. In all other aspects it will stand affirmed.

"Affirmed in part; reversed in part, and remanded for action in accordance with this opinion." (83 U.S. App. 373, 170 F. 2d 169)

Consequently, an independent portion of the judgment remained intact. A part of the very judgment which the bond secured was affirmed.

On retrial in the District Court the defendant failed to establish his counterclaim. The plaintiff then sought to avail himself of the security of the supersedeas bond. This Court pointed out that "the surety stands liable on that which is affirmed." (p. 85, 89 U.S. App. D.C.; p. 331, 191 F. 2d) The opinion noted that the reversal of a judgment as to only one of the several parties affected does not discharge the surety from liability as to the unsuccessful appellants. This is based upon the reason that the obligation of the bond was to secure such a reversal in the Court of Appeals as to leave no judgment standing which could be enforced against any of the defendants. In the case at bar the judgment of this Court setting aside the judgment of the District Court left standing no judgment which could be enforced against the defendant below.

Appellant relies also upon *Franklinville Realty Company v. Arnold Construction Company*, 132 F. 2d 828 (1943). Here there was a partial reversal and a remand for the purpose of redetermining the amount of a mechanic's lien in accordance with a different construction of a clause of the contract from that adopted by the trial court. This case on the first appeal (120 F. 2d 144) turned largely about a point of evidence, i.e. the effect to be given under a building contract to an architect's certificate. The trial court had given the certificates conclusive effect and denied an effort to impeach them. On appeal, the Court of Appeals affirmed

the judgment in part but reversed as to the point of evidence, remanding the cause for further proceedings limited to a determination of whether or not the certificates were correct in fact, and directing judgment to be entered after such findings had been made. The court said:

"Because of the error in holding the certificates final and conclusive the case will be reversed for further proceedings limited to the presentation of evidence as to whether or not the labor and services listed in the certificates were actually used on the job, and whether or not the materials listed were actually used or specially fabricated for use in the building. Judgment will be entered after such findings have been made.

"The judgment is affirmed in part and reversed in part and the cause is remanded for further proceedings in conformity with this opinion. Costs of this appeal are to be divided between appellant and appellee." (120 F. 2d 148, 149)

The Court of Appeals held that the supersedeas bond was not released and discharged by this partial reversal. That court pointed out that the judgment was not one of reversal but one of affirmance with the reversal limited to taking evidence and obtaining findings upon whether the appellee should have judgment for the same or less sum.

In neither of these cases was the District Court's judgment set aside as ordered by the Court in this case. It is obvious from a reading of the opinion of the Court on the prior appeal in this case (106 U.S. App. D.C. 386, 273 F. 2d 512) that the judgment of the District Court was so far lacking in foundation that this Court was unwilling to preserve any part of it as a basis for further proceedings. Nor is it to be supposed that this Court was not aware of the difference between setting aside a judgment, affirming a judgment or modifying it in part. In the *Rector* case, *supra*, a separable portion of the judgment was expressly affirmed. In the *Franklinville Realty* case, *supra*, there was an affirmance in part and a reversal in part with an express

direction as to the area to be explored under the reversal. In the case at bar the judgment was set aside and completely destroyed for all purposes. While it is urged by appellant that liability for the breach of contract was determined on the appeal, it is equally true that in practically every case of reversal and remand, some points are necessarily disposed of even if only the limited negative proposition that the basis for judgment was untenable and must not be used again on a retrial. Upon every remand it will be observed that substantial points in issue between the parties are settled for the guidance of the trial court but this does not mean that upon every remand the supersedeas bond will remain to answer for the ultimate liability of the party who gave it.

The appellant suggests that the surety is not discharged from its liability unless it seeks a release from the court. The short answer to this is that the rights of the parties were irrevocably fixed by the judgment of this Court. If the appellant thought this Court's judgment was in error and desired to question its effect, it could have done so by appropriate petition for rehearing or modification within the time provided. It is not the function of a trial court to enter declaratory judgments on questions such as this in connection with the disposition of each appeal. Nor is there any such practice. It is very doubtful that the District Court would entertain such an application. Had such an application been made and denied, the surety would have taken an appeal from that denial. Had the application for discharge been granted, as it must have been if the trial court assumed to entertain it, there would have been nothing whatever that the present appellant could have done to improve its position. The *Rector* case and the *Franklinville Realty* case demonstrate the extent to which the security of the supersedeas bond may be preserved by the appellate court. It is for the appellate court in disposing of the appeal to determine whether or not some part of the judgment shall be retained and affirmed, whether

the judgment shall be modified as by remittitur or whether the judgment shall be extinguished, leaving the controversy to be determined by a new judgment of the trial court. Where the ultimate outcome is uncertain, there is no reason why the successful appellant should be required to leave his security, if United States bonds are deposited with the Clerk, in the custody of the court during the pendency of the action simply because the trial court erroneously entered judgment against him in the first place. Similarly the right of the successful appellant to recover collateral or other indemnity deposited with his surety ought not to be suspended until the final termination of the action where he has succeeded in extinguishing an erroneous judgment against him.

CONCLUSION

The terms of the obligation are clear and unmistakable. The appeal was not dismissed, the judgment was not affirmed and the Appellate Court did not adjudge and award a modification of the judgment. The purpose of the supersedeas bond had been served; its condition had been fulfilled. Liability under it was at an end. It is respectfully submitted that the decision of the court below was correct and should be affirmed.

Respectfully,

ALEXANDER M. HERON
EDGAR T. BELLINGER

*Attorneys for Appellee, Fidelity
and Deposit Company of Maryland*

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,907

F. S. BOWEN ELECTRIC CO., INC.,

Appellant,

v.

FIDELITY & DEPOSIT CO. OF MARYLAND

and

J. D. HEDIN CONSTRUCTION CO., INC.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 6 1962

Joseph W. Stewart

CLERK

MICHAEL A. SCHUCHAT

231 Tower Building
Washington 5, D. C.

Attorney for Appellant



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,907

F. S. BOWEN ELECTRIC CO., INC.,

Appellant,

v.

FIDELITY & DEPOSIT CO. OF MARYLAND

and

J. D. HEDIN CONSTRUCTION CO., INC.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

I.

The obligation of a surety on a supersedeas bond is determined by the language of Rule 73(d) of the Federal Rules of Civil Procedure as that language has been interpreted by the courts. As here involved, the surety engaged itself to pay if the judgment is "affirmed" -

"affirmed" in the sense that this term has been judicially construed and interpreted.

Prior to this case, the word "affirmed" was judicially defined by this Circuit in Rector v. Massachusetts Bonding & Insurance Co., 89 U.S. App. D.C. 83, 191 F.2d 329. There this Court said that a judgment is "affirmed", as that term is used in Rule 73(d), unless it is wholly or at least substantially reversed. Unless this occurs, the surety on a supersedeas bond is not discharged from its liability.

In the instant case, this Court did not reverse the judgment below. The order did not state that it was a reversal. Nor was there reversal in substance. This Court upheld the District Court's judgment on the principal point involved in the appeal, the liability of the defendant. This Court set aside the judgment and remanded it for a very limited purpose — reassessment of the award of damages.

To suggest, as appellee does, that Judge Washington's opinion merely settled certain points at issue "for the guidance of the trial court" is absurd. The decision settled for all time all the issues except that the trial court was directed to "reassess" the amount of damages. This Court evidently considered its remand to be highly restricted because it felt impelled to include in the mandate a specific authorization to the District Court permitting it to take additional testimony, if desired. The pretrial statements of the parties (JA 20-21); the pretrial order (JA 21); the report of the Special Master (JA 23) all reflect the limited nature of the remand and that only one issue was open.¹

¹ Parenthetically, it should be noted that the Judge who tried the case and entered the judgment, the late Hon. Edward P. Murphy, died prior to the issuance of the mandate. Had he been alive to consider the mandate, familiar as he was with the record, the witnesses and evidence, the proceedings on remand would probably have been quite brief.

The circumstances of the remand in this case are identical with the circumstances involved in Franklinville Realty Co. v. Arnold Construction Co., 132 F.2d 828 (5 Cir. 1943). In both cases there was a remand to reassess the amount of damages with no authority being given to disturb the judgment of liability. The remand was not to decide if plaintiff was to have a judgment but how much the judgment should be. Appellee admits that in Franklinville there was an "express direction of the area to be explored on remand". The same was true in this case. The surety was held liable in the Franklinville case and the surety herein is similarly liable.

II.

The surety claims a release from its obligation not by virtue of any court order so discharging it, but by implication. The surety reads into this Court's order of January 18, 1960, what it does not say, i.e., that the surety is released. Appellant contends that a surety on a supersedeas bond should not be discharged by implication without specifically seeking its discharge at the time and being specifically released from its liability. The surety's present claim comes too late and for that reason alone should be rejected. The surety should not be allowed to escape its obligation by a retroactive discharge by implication. It is unfair to appellant who was stayed from execution of its judgment. By executing the bond, the surety enabled Hedin to continue the litigation without being subject to execution on the judgment. When the fight was lost, the surety then claimed that it had been discharged by implication one and one-half years previously. To let the surety make such a claim now is unjust. It surely is not asking too much that a surety specifically seek its release when it claims to be released by implication.

Appellant's position was substantially changed by virtue of the bond. At the time of the execution of the bond Hedin was a solvent

company which it is not today. Transformance from solvency to insolvency occurred while appellant's hand was stayed by the surety. Under the circumstances, the surety's claim of a retroactive discharge comes too late.

CONCLUSION

In view of the foregoing reasons and those cited in Appellant's Brief, the decision of the court below should be reversed and this Court should order judgment entered against appellee Fidelity & Deposit Company of Maryland in the amount of \$30,000.00 with interest from November 3, 1961.

Respectfully submitted,

MICHAEL A. SCHUCHAT

231 Tower Building
Washington 5, D. C.

Attorney for Appellant

